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POSITION STATEMENT OF RESPONDENT

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April 14, 2015

Filed Through E-Gov, E-Filing and Via Email

United States Government
NATIONAL LABOR RELATIONS BOARD
Office of the Executive Secretary
1099 14th Street NW, Suite 11600
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RE: Medco Health Solutions of Las Vegas v. NLRB, 701 F.3d 710 (D.C. Cir. 2012)

Pursuant to the March 10, 2015 letter sent to the parties in the above-captioned matter by Associate Executive Secretary Farah Z. Qureshi, the following constitutes the position of Respondent Medco Health Solutions of Las Vegas ("Medco").¹ This Position Statement is submitted for the Board's consideration in light of the December 14, 2012 Remand of the above-styled matter by the United States Court of Appeals for the District of Columbia Circuit (hereinafter referred to as the "D.C. Circuit Remand") and the Board's subsequent acceptance of such Remand.

¹ Medco Health Solutions of Las Vegas, Inc. merged into Express Scripts Pharmacy, Inc. on or about December 17, 2013.

I. Introduction

For the reasons set forth herein, as well as those set forth in the D.C. Circuit Remand and Medco's prior briefing related thereto, the Board should modify its previous Decision and Order in the above-captioned matter, dated July 26, 2011, and issue an order finding that Medco did not violate the National Labor Relations Act in ordering former employee Michael Shore ("Shore") to remove his t-shirt in accordance with Medco's ban on insulting, provocative and confrontational expressions on clothing. Medco has made an affirmative showing that "special circumstances" – namely, the threat of potential damage to Medco's client relationships – existed and justified Medco's restriction on Shore's wearing of a t-shirt which directly insulted one of Medco's significant business initiatives. As noted in the D.C. Circuit Remand, the Board's "offhand dismissal" of the "considerable evidence" of special circumstances proffered by Medco was procedurally improper and in direct contravention of well-established Board precedent.

Further, the Board should issue an Order finding that Medco's dress code policy, which bans "insulting, provocative, and confrontational" messages on clothing worn at the workplace is not overbroad, and is well within Medco's right to maintain a "civil and decent workplace." As stated in the D.C. Circuit Remand, the Board's finding that such policy is overbroad is unsupported by the facts of this case and an "abandon[ment]" of prior Board precedent established by Lutheran Heritage Village-Livonia, 342 N.L.R.B. 646, 647 (N.L.R.B. 2003).

II. Factual Background

Medco incorporates by reference the statements of fact set forth in Medco's prior briefing in this matter, which is extensive, as if such facts were more fully set forth herein. This briefing includes, but is not limited to: Medco's Statement of Position filed with the National Labor Relations Board, Region 28, on March 24, 2010; Medco's Post-Hearing Brief, filed with the

National Labor Relations Board, Region 28, on August 25, 2010; Medco's Brief in Support of Exceptions to the Decision and Order of the Administrative Law Judge, filed with the National Labor Relations Board, Office of the Executive Secretary on October 12, 2010; and Medco's Brief in Support of its Petition for Review filed with the D.C. Circuit on November 25, 2011. For the Board's convenience and ease of reference, Medco briefly restates below the facts most pertinent to this analysis in light of the DC Circuit Remand only.

A. Medco

Medco is² a pharmacy benefits manager that operates a mail order pharmacy in Las Vegas, Nevada. Tr. 25-26³; Medco Health Solutions of Las Vegas v. NLRB, 701 F.3d 710, 712 (D.C. Cir. 2012). Tom Shanahan was the Vice President and General Manager with overall responsibility for Medco's Las Vegas Pharmacy operation. Tr. 37, 128, 281. Michele Agnew was responsible for overseeing the employee and labor relations function. Tr. 24. Both Shanahan and Agnew were involved in collective bargaining as well. Tr. 29-30, 281.

B. The WOW Program

Medco introduced the WOW recognition program at the Las Vegas Pharmacy in about July 2009. Tr. 30, 39; GCX 2; Medco Health Solutions of Las Vegas, 701 F.3d at 712. Both the pharmacy and the pharmacists unions were advised of the WOW program in writing and neither unit requested to bargain about the program. Tr. 136-137.

The WOW program was an effort to recognize employees for doing a good job. Tr. 30, 38, 282; Medco Health Solutions of Las Vegas, 701 F.3d at 712. An employee can be nominated

² Although several years have passed since the relevant time period at issue, the facts set forth herein are stated based on the relevant time period unless otherwise specifically noted.

³ The parties filed a deferred appendix during the Appeal of this matter to the District of Columbia Circuit. Consistent with the parties' briefing during that stage of the proceedings, exhibits are cited herein as follows: Transcript = "TR"; Medco Exhibit = "RX"; General Counsel Exhibit = "GCX"; Decision & Order = "D&O."

by a co-worker, a patient, a physician's office, or a supervisor. Tr. 30-31. Medco management votes on the nominations and makes the decision to award a WOW award. Tr. 32-33, 285. An employee receiving a WOW award gets a lanyard and a certificate, and is honored at a reception in the employee cafeteria. Tr. 32, 37, 283-284. Employees do not receive a monetary award with a WOW award. Tr. 35, 287. A WOW award is not used to determine pay raises or promotions. Tr. 39-41, 287, 289, 314. Pay raises for the bargaining units are determined by the collective bargaining agreement. Tr. 39-40, 315. WOW awards are not kept in the employee's personnel file. Tr. 42. There are no consequences if an employee refuses to accept a WOW award. Tr. 193-194, 286.

C. Client Tours of the Medco Facility

The pertinent facts with respect to Medco's client tours are not in dispute. Medco runs about 100 client tours annually at its Las Vegas Pharmacy, averaging about two to three tours per week. Tr. 130-131, 299; Medco Health Solutions of Las Vegas, 701 F.3d at 712. Tours take anywhere from a few hours to the entire day. Tr. 132. The tour route goes through the cafeteria, where Medco's clients are shown the Wall of WOW. Tr. 63, 315. The Wall of WOW is a large wall with employees' names and the basis for their WOW recognition. Tr. 134-135, 315. There is no dispute that Medco considers the WOW program an important element of the pitch it gives prospective and current clients both during tours and otherwise. Indeed, Medco, at the relevant time period, assigned a fulltime employee to the task of managing the WOW program. Medco Health Solutions of Las Vegas, 701 F.3d at 717. There is also a slide presentation during the tour which explains the WOW program. Tr. 135.

The tour route is set in advance, but clients may ask to see other areas of the pharmacy on either the first or second floor. Tr. 63-64, 300. The tours go through various work areas and

departments in the pharmacy, where non-pharmacy staff and pharmacists are seen. Tr. 133, 300-301, 315. Although some tours are scheduled in advance, many occur with minimal or no notice whatsoever. Medco Health Solutions of Las Vegas, 701 F.3d at 716 (“Shanahan and another Medco manager both testified that unscheduled tours occurred periodically, and that visitors sometimes entered the Las Vegas facility without advance notice.”)

D. Shore’s WOW T-Shirt

Shore was formerly employed by Medco as a coverage review representative until he voluntarily resigned in June 2010 to move to Washington State. Tr. 48-49, 148, 214-215. Shore was a member of the United Steel Workers Local 675 and was a union steward. Tr. 55, 218.

On February 12, 2010, Shore wore a t-shirt to work that said on the back: “I Don’t Need a WOW To Do My Job.” Tr. 221. It was the only day that Shore wore the t-shirt to work at Medco. Tr. 226; Medco Health Solutions of Las Vegas, 701 F.3d at 712. It is undisputed that the reference on the t-shirt was to Medco’s “WOW” program. Tr. 223. The t-shirt also had a union logo on the front. Tr. 224. Medco was not concerned with the union logo, and many employees at Medco wear clothing with a union insignia or logo without objection by Medco. Tr. 157-159. Indeed, the parties stipulated that Medco allowed employees in the bargaining unit to wear union-related t-shirts. Tr. 235; see also Medco Health Solutions of Las Vegas, 701 F.3d at 712-13 (“Medco appears never to have objected to clothing bearing a union logo or name”). Moreover, it is undisputed that, after being asked to remove the t-shirt, Shore was offered another shirt with the same union insignia. Tr. 257, 296.

Shore was seen wearing the t-shirt in the Medco cafeteria by Medco’s Environmental Health and Safety Coordinator, Justin Cook, Medco’s Tour Manager, Gina Nissen, and the WOW Specialist, Jennifer Bott, who oversees the administration of the WOW program in Las

Vegas. Tr. 53, 58, 151, 296, 316. As Tour Manager, Nissen is responsible for scheduling and running tours given by Medco to its prospective and existing customers described above. Tr. 132, 299. On the day Shore wore the t-shirt, an existing client, Land o' Lakes, the butter company, toured the Medco pharmacy. Tr. 56-57; Medco Health Solutions of Las Vegas, 701 F.3d at 712. Notably, a tour could go through the area where Shore worked in the coverage review department. Tr. 319. It is undisputed that tours go through the cafeteria, where Shore was seen wearing the t-shirt. Tr. 63, 315.

E. Medco's Dress Policy

Medco had a dress policy at the relevant time that stated: "Articles of clothing that contain phrases, words, statements, pictures, cartoons or drawings that are degrading, confrontational, slanderous, insulting or provocative are never appropriate." GCX 4; Medco Health Solutions of Las Vegas, 701 F.3d at 712-13. Under this policy, "provocative" refers to clothing that is sexually suggestive or revealing. Tr. 47-48. "Insulting" refers to clothing that offends other employees or management. Tr. 48.

F. Shore is Asked to Remove the Insulting WOW T-Shirt.

Cook, Nissen and Bott all expressed concerns to Shanahan about Shore wearing the slogan on the back of the t-shirt. Tr. 317-318. Shore was told to go to Shanahan's office to meet with Shanahan and Agnew, along with his union representative, Osterman. Tr. 49, 228, 293. Prior to the meeting, Agnew informed Osterman that Shore had been seen wearing the t-shirt and Agnew described the slogan on the back. Tr. 156. Osterman told Agnew that Osterman had given Shore the t-shirt. Tr. 156. Osterman also said that she told Shore not to wear the t-shirt at work. Tr. 156.

Shore was not called to Shanahan's office to be disciplined. Tr. 50. Neither Shanahan nor Agnew was concerned with the union logo on the front of the t-shirt. Tr. 55; Medco Health Solutions of Las Vegas, 701 F.3d at 712. Shanahan stated that he was disappointed, that the slogan on the back of the shirt was offensive to him, and that the slogan was insulting to the WOW program. Tr. 51, 230, 255, 257, 296; Medco Health Solutions of Las Vegas, 701 F.3d at 712-13. Shanahan also commented that Medco had a client on site that day. Tr. 55. Agnew also stated that she was disappointed, that the t-shirt was insulting, that there was a client tour that day and that Shore would have to remove the t-shirt. Tr. 60, 296.

Osterman understood that the t-shirt would be offensive to Medco. Tr. 267-269, 272. Osterman offered Shore a different shirt with a union insignia but Shore declined. Tr. 257, 296. Shore had a shirt in his car, changed his shirt, and returned to work. Tr. 60-61, 231, 258.

Shore testified that he is aware of other employees who have been asked to remove and change t-shirts that were offensive. Tr. 238-29. Osterman also testified that she is aware of other employees who have been asked to remove and change t-shirts that were offensive. Tr. 270. Osterman is not aware of any employee who has been written up or disciplined for violating the dress code policy. Tr. 271. Shore was not written up or disciplined for violating the dress code policy with respect to the t-shirt either. Tr. 164-165, 271. Neither Shanahan nor Agnew told Shore that he would be disciplined or terminated for wearing the t-shirt. Tr. 164, 323. Shanahan said that if Shore could not support the company's programs that maybe Medco was not the place for him. Tr. 297.

III. Argument

Section 7 of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), grants employees the right to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) enforces Section 7 by making it unlawful for employers to “interfere with, restrain, or coerce” employees’ exercise of their rights under that provision. *Id.* at § 158(a)(1); see also Medco Health Solutions of Las Vegas, 701 F.3d at 715.

It is well-settled under Board precedent that although employees have a right under Section 7 to wear union insignia at work, this right is “not without limitation, for ‘special circumstances may exist which justify restriction of the right’ to wear union insignia. London Mem’l Hosp., 238 N.L.R.B. 704, 708 (N.L.R.B. 1978) (citing Evergreen Nursing Home and Rehab. Ctr., Inc., 198 N.L.R.B. 775, 778-779 (N.L.R.B. 1972)); Komatsu America Corp., 342 N.L.R.B. 649, 650 (N.L.R.B. 2004); Nordstrom, Inc., 264 N.L.R.B. 698, 700 (N.L.R.B. 1982). An employee’s right to wear union insignia may be curtailed “if the employer makes an affirmative showing that the union insignia that the employee seeks to wear will negatively impact a certain public image that the employer seeks to project. Meijer, Inc. v. NLRB, 130 F.3d 1209, 1217 (6th Cir. 1997); United Parcel Service, Inc., 195 N.L.R.B. 441, 449 (N.L.R.B. 1972).

Here, Shore’s t-shirt, in addition to displaying union insignia, displayed a phrase that was unambiguously insulting to one of Medco’s business initiatives, the WOW program, thereby creating the threat of potential damage to Medco’s client relationships – particularly in light of the regular tours occurring in the Medco facility – including on the day Shore wore the t-shirt. Accordingly, Medco has successfully demonstrated that “special circumstances” existed which warranted Medco’s restriction on Shore’s wearing of the t-shirt.

Further, Medco's dress policy, which prohibited confrontational, insulting, and provocative messages on clothing worn at the workplace is not overbroad under Section 7, and is well within Medco's right to maintain a decent and civil workplace. Medco Health Solutions of Las Vegas, 701 F.3d at 718; Lutheran Heritage Village-Livonia, 342 N.L.R.B. 646, 647 (N.L.R.B. 2003). As noted in the D.C. Circuit Remand, the Board erred in deviating from well-established Board precedent in Lutheran Heritage by finding that Medco's dress policy was overbroad. Id.

A. Medco has Demonstrated Potential Harm to Client Relationships and is not Required to Proffer any Evidence Beyond that of a Risk of Potential Harm

In this case, the Board erred by holding that there is no evidence that the t-shirt worn by Shore raised the genuine possibility of harm to the customer relationship. D&O, p. 2; Medco Health Solutions of Las Vegas, 701 F.3d at 717 ("Medco has provided considerable evidence that the WOW program is an important element of the pitch it gives prospective and current clients; the company even assigns a fulltime employee to manage the program. This evidence, and the tone of the t-shirt gibe at Medco's management, seem to preclude an offhand dismissal of the contention that the t-shirt would threaten to damage Medco's relationship with its customers.").

The un rebutted testimony of Medco's witnesses was that the potential that Shore could be seen by clients was a significant factor in Medco's objection to Shore's t-shirt. As outlined above, Medco conducts at least one hundred tours of its facility per year to generate new business and to obtain the renewal of client contracts. Tr. 130-131, 299; Medco Health Solutions of Las Vegas, 701 F.3d at 712. The WOW program is explained to customers who are touring the facility, and the tours take customers and prospective customers through the cafeteria which contains the Wall of WOW – where Shore was seen wearing the t-shirt. Medco Health Solutions

of Las Vegas, 701 F.3d at 717. Tours also take customers and prospective customers through areas where pharmacists and other employees are working. Id. Indeed, on the day Shore wore his WOW t-shirt to work, a client was touring the Medco pharmacy. Even though Shore claims he wore a dark blue lab coat over his t-shirt while at his work station, he admits that when he went to lunch, he took off the lab coat. Shore walked through the hallways and the cafeteria with his WOW t-shirt on, and could have been seen by a client.

Therefore, because of the insulting nature of the t-shirt and these “special circumstances,” the company was justified in asking Shore to remove the shirt. See London Mem’l Hosp., 238 N.L.R.B. at 708; Komatsu America Corp., 342 N.L.R.B. at 650; Nordstrom, Inc., 264 N.L.R.B. at 700. Osterman even offered Shore another t-shirt with a union insignia to wear that did not have the slogan, which Medco would have permitted, but Shore chose to decline the offer.

As noted by the D.C. Circuit in the Remand, Medco need not offer any actual proof that a customer relationship was actually damaged or that a client actually saw Shore wearing the t-shirt, nor is Medco required to offer *any* “additional evidence beyond a relationship between its business and the banned message.” Medco Health Solutions of Las Vegas, 701 F.3d at 717 (“we do not think the Board has adequately explained why Medco’s claim of harm to customer relations requires evidence beyond what it has already adduced, while those of the employers in *Pathmark* and *Noah’s New York Bagels* required none.”).

Indeed, as the D.C. Circuit recognized, the Board has previously held, in Pathmark Stores, Inc. 342 NLRB 378, 379 (2004), that although the company had “presented no evidence that customers decided not to buy” its products in response to the banned slogan, the ban was upheld because the Board found “the slogan reasonably threatened to create concern among [the company’s] customers. See also Medco Health Solutions of Las Vegas, 701 F.3d at 717. This

body of law is clearly designed to allow an employer to *prevent* actual harm to its business. An employer should not have to wait until a client relationship is already damaged to take action.

Accordingly, to require Medco to proffer evidence beyond a relationship between the slogan on the t-shirt and its business, in addition to a threat of potential harm to client relationships, would be in direct contravention of the Board's prior decisions in Pathmark and Noah's New York Bagels, in addition to the D.C. Circuit Remand. By presenting uncontroverted evidence that a client very reasonably could have seen Shore wearing a shirt that unambiguously insulted one of Medco's business initiatives, Medco has met its burden of demonstrating an affirmative showing of "special circumstances."

B. Medco Is Not Obligated to Demonstrate That the T-Shirt Disparaged Medco's Merchandise or was Vulgar / Obscene

The Board incorrectly concluded that there were no such "special circumstances" because Shore's t-shirt "was neither vulgar nor obscene." D&O, P.2, N. 8. The case law simply does not require that messages on clothing be vulgar or obscene for an employer to lawfully restrict an employee's wearing of such clothing. To the contrary, as the D.C. Circuit noted in the Remand, special circumstances can "obviously" exist when a message "belittles" or "critiques" an employer's operations. See Medco Health Solutions of Las Vegas, 701 F.3d at 717 ("At oral argument Board counsel proposed to read these cases as limited to disparagements of an employer's merchandise. But obviously an employee can harm an employer's customer relations by belittling or critiquing other aspects of the employer's operations."). For an employer to lawfully prohibit the wearing of such clothing, it is sufficient that the clothing be damaging to the employer's business and that it can be seen by and interfere with the employer's customer relationships, as was the case here. Id.

In Noah's New York Bagels, Inc., 324 N.L.R.B. 266, 275 (N.L.R.B. 1997), an employee was wearing a Noah's t-shirt as required by the employer, but her shirt had the added phrase, "If its [*sic*] not Union, its [*sic*] not Kosher." The employee was asked to remove the shirt and was given another Noah's t-shirt to wear. Id. The Board concluded that the employer's "insistence that [the employee] not wear a shirt mocking its Kosher policy was lawful." Id. The Board recognized that employees, including the employee at issue, were permitted to wear union buttons, and were permitted to wear union shirts before and after going on their routes. Id. Because the employee's shirt mocked the employer's policy, special circumstances existed to justify directing the employee to remove the shirt. Id. Similarly, in Pathmark Stores, Inc., 342 N.L.R.B. 378, 379 (N.L.R.B. 2004), the Board held that a grocery store could, because of its "legitimate interest in protecting its customer relationship" lawfully prohibit its employees from displaying the message "Don't Cheat About the Meat" in protest of the store's use of prepackaged meat products. See Medco Health Solutions of Las Vegas, 701 F.3d at 717.

As noted in the D.C. Circuit Remand, there is no basis for the Board to distinguish the present matter from Noah's New York Bagels or Pathmark on the grounds that Shore's shirt did not disparage the *merchandise* of Medco – as such a distinction is wholly arbitrary. "Especially for a firm selling a *service*, concern for customers' appraisal of its employees' attitudes seems natural." Medco Health Solutions of Las Vegas, 701 F.3d at 717. Here, as outlined above, Medco made considerable efforts to promote its WOW program to clients – to demonstrate its employees' hard work and efforts in providing the very services such clients were contracting with Medco for. Shore's t-shirt directly and unambiguously insulted and belittled the WOW program, reflecting an attitude of ambivalence, if not "sullen resentment," for the WOW program and what it represents. See Medco Health Solutions of Las Vegas, 701 F.3d at 717. As outlined

in the D.C. Circuit Remand, as a business providing a service, Medco certainly is reasonable to be concerned about the impression its employees' attitudes may make on clients. Accordingly, there were "special circumstances" justifying Medco's restriction on Shore wearing the shirt.

C. Medco's Dress Policy Prohibiting Insulting, Confrontational, and Provocative Messages on Clothing in the Workplace is Not Overbroad.

The Board erred in finding that Medco's dress policy, which prohibited confrontational, insulting, and provocative messages on clothing worn at the workplace is overbroad under Section 7. To the contrary, this policy is well within Medco's right to maintain a decent and civil workplace. Medco Health Solutions of Las Vegas, 701 F.3d at 718; Lutheran Heritage Village-Livonia, 342 N.L.R.B. 646, 647 (N.L.R.B. 2003).

The Board recognized, in Lutheran Heritage, that an employer has a right to maintain a decent and civil workplace. Medco Health Solutions of Las Vegas, 701 F.3d at 718. As simply stated by the D.C. Circuit, expressions of insulting, confrontational, and/or provocative messages on clothing in the workplace are "seldom found in civil and decent places of employment." Id. Further, when a workplace rule does not either expressly or inherently restrict protected activity (as this rule does not), any decision that the rule's mere existence violates the Act must be supported by a finding that either: (1) the rule was promulgated in response to union activity; or (2) a reasonable employee reading the rule would construe it to prohibit protected conduct. Id. There is simply no evidence of either scenario here, and the Board has failed to offer any basis for its abandonment of the body of law set forth in Lutheran Heritage. Id.

IV. Conclusion

For the reasons set forth herein, as well as those set forth in the D.C. Circuit Remand, the Board should modify its prior order in the above-captioned matter and issue an order finding that Medco did not violate the Act in ordering Shore to remove his t-shirt in accordance with

Medco's ban on insulting, provocative and confrontational expressions on clothing. Further, the Board should issue an order finding that Medco's dress policy banning insulting, confrontational, or provocative clothing is not over broad.

Sincerely,

A handwritten signature in cursive script that reads "mzaken/ce".

Marc L. Zaken

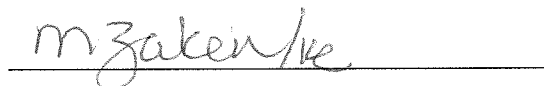
AFFIDAVIT OF SERVICE

This is to certify that on April 14, 2015, the foregoing Statement of Position was served
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A handwritten signature in cursive script, appearing to read "m. Zaken", is written over a horizontal line.

Marc L. Zaken